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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Pursuant to Rule 24(4), we respectfully submit this short reply to certain of the matters urged in Respondents' Brief in opposition to the Petition for Certiorari filed herein August 25, 1966.

I.

The Questions of Nationwide Importance Presented by the Petition Are Squarely Raised by the Judgments Below and Are Not Obviated by Respondents' Inaccurate Interpretation of the Basis of the Decisions of the Court Below or Their Pejorative Restatement of the Questions.

As we have shown, the questions presented for review are of great importance not only to the millions of people in California but to citizens throughout the na-

tion (Pet. pp. 8-11). Here, a state court, relying solely on the federal constitution, has declared invalid an amendment to a state constitution adopted by an overwhelming popular vote.[1] Such a nullification of the legislative will should be accomplished, if at all, only by the authoritative judgment of this Court, at least in cases such as these where the correctness of the decisions below is extremely doubtful.

Respondents' effort to sweep aside these critical questions is based primarily upon their erroneous contention that the Court below did not decide that repeal of anti-discrimination legislation was forbidden by the equal protection clause. Section 26, they say, "made freedom to discriminate a secured and inviolable right under the State constitution", (Resp. Br. p. 10), that it was "a complete disenablement of all California government . . . from hitting directly at racial discrimination in the sale . . . or leasing of residential property" (Resp. Br. p. 8). They argue that it was this "substantive provision" of Section 26 that was held unconstitutional and not its repealing effects (Resp. Br. pp.

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[1]According to a recent public opinion poll, *72%* of California voters would answer "yes" to this question in mid-September, 1966: "Do you believe that a property owner has the right to discriminate in any way he sees fit as far as the sale or rental of his own property is concerned?" *22%* would answer "no," 6% would answer "don't know." The State Poll, *Los Angeles Times*, September 21, 1966, Part I, p. 3. See the classic dissent of Mr. Justice Brandeis in *Truax v. Corrigan*, 257 U.S. 312 at 357:

> "* * * Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread, and has been reached after deliberation. * * *"

7, 10-12). These assertions, to put it bluntly, are not true.

In adopting section 26 as a part of their Constitution, the people of California decided two and only two issues: (1) they repealed legislation inconsistent with its provisions, (2) they reserved to themselves the legislative power under the initiative process to regulate the conduct of the owners of private residential property in declining to sell or lease it for whatever reason or for no reason at all. The Court below did not question the validity of the people's resolution of the second issue (Pet. p. 12, n. 10). That question had been decided favorably to petitioners' position in a prior case, *Higgins v. City of Santa Monica,* 62 Cal. 2d 24, 41 Cal. Rptr. 9, 13. Therefore, the basis of the judgments below must be the California Court's view that the *pro tanto* repeal of preexisting legislation accomplished by Section 26 is repugnant to the equal protection clause.[2]

Contrary to respondents' verbalisms (Resp. Br. pp. 8-15) about "disenablement", "state involvement", the "pro-discrimination nature of its purpose", and the like, the decisions below were based on the determination on undisputed facts that California was responsible under the Fourteenth Amendment for private racial discrimination because it changed its legislative policy from one of prohibiting certain racial and religious discrimination to a policy of not prohibiting such conduct (App. p. 52, Pet. pp. 12-17).

Section 26 is a legislative choice which continues in effect one of the most comprehensive anti-discrimination regulatory programs in the nation (See Pet. pp. 12-17).

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[2]The Court below also relied, especially in *Prendergast,* on an erroneous view of *Shelley v. Kraemer,* 334 U.S. 1, *infra* p. 6, Pet. pp. 17-23.

Section 26 does not put California in the position of "sanctioning and encouraging, indeed inviting private persons to discriminate on racial grounds" (Resp. Br. p. 8) nor did the Court below so hold (App. pp. 40-41, 52-53). The section, as evidenced by the ballot arguments (App. pp. 3-6) as well as the language of the measure viewed in the contemporary context in which it was adopted, is a declaration by the people that the imposition of the coercive sanctions of government on the private owners of residential property is not at this time in the public interest; that freedom from governmental restraint in this narrow area of conduct is more likely to promote satisfactory human relationships than what was deemed to be unnecessary, oppressive, hastily drawn, unfair, and illogical regulations; that in striking the balance between equality and freedom in this area, the State should leave to self-determination the conduct of private persons dealing with their own residential property. See Lewis, *The Sit-in Cases: Great Expectations,* The Supreme Court Review (1963), Univ. of Chi. Press, pp. 101 at 132-133.

Respondents' contrary contentions are as unsound as would be the view that the Boston Tea Party took place to seek a lower price for tea rather than to dramatize a protest against what was considered to be unfair and unwanted governmental regulation.

Fairly analyzed, we repeat, the decisions below squarely raise each of the five questions set forth in the Petition (3-4). Moreover, respondents surely err in asserting that the problem of whether the state is so involved in private racial discrimination as to make the

Fourteenth Amendment applicable is a "question of fact . . . for the review of which this Court's certiorari jurisdiction is ordinarily [not] exercised." (Resp. Br. p. 15). The Court below relied on no factual findings that California or any of its officials or section 26 itself actually influenced the conduct of petitioners in any way. The California Court relied exclusively on its interpretation of the Constitutional principles announced by this Court, in the numerous decisions cited in the opinions below, to an undisputed sequence of legislative activity: The adoption of anti-discrimination statutes followed by the adoption of section 26 which "nullified" those statutes in part and "forestalled" such legislation in future except by popular vote (App. p. 40). The use of active verbs by respondents or by the distinguished Court below—words employed by this Court in fundamentally different contexts—do not convert the important Constitutional questions involved in these cases into nonreviewable questions of fact. They are questions raised by the erroneous application by the Court below of this Court's constitutional principles to the undisputed facts in these cases (Pet. pp. 12-17).

For these reasons, it is also unsound to assert, as respondents do (Resp. Br. pp. 16-17), that the constitutional problems are unique to California and not of general public importance. The issues raised below create a current problem that confronts the people and the legislatures in all states which contemplate the enactment, modification, or repeal of anti-discrimination legislation. (See Pet. pp. 9-11).

II.

The Judgment in Prendergast Below Was Based Squarely Upon Two Alternative Grounds, One of Which Was the Erroneous Interpretation of Shelley v. Kraemer Discussed in the Petition (pp. 17-23).

Both decisions below relied extensively on the extreme interpretation of *Shelley v. Kraemer,* 334 U.S. 1, discussed in the Petition at pages 17-23 (App. pp. 46, 90). Contrary to respondents' contention (Resp. Br. pp. 18-20), the judgment in *Prendergast* was specifically based on two alternative grounds, one of which was that drastic view of *Shelley.* The Court said (App. p. 90):

> "For that reason [e.g. the court's holding that section 26 offended the Fourteenth Amemdment], *as well as those relied upon by the trial court,* defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed." (Emphasis added.)

The *only* ground upon which the trial court relied was the erroneous extension of *Shelley v. Kraemer* to prohibit jural recognition of a private right whenever the motive of the private litigant is one forbidden to the State (App. p. 86). It is hardly accurate to assert that the trial court's opinion was "superseded by the affirming opinion of the Supreme Court" (Resp. Br. p. 18, n. 18) in this case where the Supreme Court specifically places reliance on the grounds "relied upon by the trial court." Thus, the questions set forth in the Petition (3 and 4, at p. 4) relating to *Shelley v. Kraemer* are squarely and necessarily presented.

III.

That Other Parties in Related Cases Have Not Sought Review in This Court Is Not a Valid Reason for Denying the Writ Here Where the Record Is Wholly Adequate to Permit Review of the Questions Presented.

Opposition to review is also based upon the stunning proposition that petitioners should be automatically barred in this Court because others similarly situated did not elect to seek review (Resp. Br. p. 23). This argument is advanced notwithstanding the attorney for one of the others who did not seek review (plaintiff in *Hill v. Miller,* 64 Cal. 2d ...., 64 Adv. Cal. 598, 50 Cal. Rptr. 908) also appears as one of the attorneys for these respondents.

Petitioners are not parties to any of the other related proceedings (Resp. Br. p. 23, n. 23), and their counsel have no authority to appear for any of the parties in any of the other cases. No doubt the trial courts in California will be as able to give general application to such decision as this Court makes should it grant review here as they are in applying this Court's decisions to defendants in criminal cases although they were not parties to the cases in which this Court rendered the decisions.

Finally, respondents assert an "incomplete record" as a reason for denying the writ (Resp. Br. p. 25). The lack of merit in this contention is obvious upon a reading of the opinions of the Court below. The decisions were based on undisputed facts (Pet. pp. 5-7). Even respondents admit that the judgment in *Prendergast* is final and that there is no dispute of fact in the record in that case. Since *Prendergast* presents squarely all

five questions raised in the Petition, we respectfully suggest the Court need not consider respondents' contentions that the *Mulkey* judgment lacks "finality." If they are correct, the judgments in the other five cases are not final either, and the courts below will have ample opportunity to apply in those cases the legal principles this Court announces should it grant the petition here. The proceeding in *Prendergast* affords a complete record, independent of the records in *Mulkey* and the other five cases, for determination of all the questions sought to be reviewed.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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